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79-1925

# UNITED STATES OF AMERICA
# THE SUPREME COURT

**MOUNTAINEER EXCAVATING COMPANY, INC.,**
**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD,**
**Respondent**

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**PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

---

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Petitioner (the Company) prays that a Writ of Certiorari issue to review the judgment entered March 12, 1980, by the United States Court of Appeals for the Fourth Circuit (the Court of Appeals).

## I.

## Opinions Below

The decision and order of the National Labor Relations Board (the Board) is

reported at 241 N.L.R.B. No. 80, 1978-1979 N.L.R.B. Dec. ¶15,678 (March 23, 1979) and appears in the Appendix. The opinion of the Court of Appeals, dated March 12, 1980, is unreported and appears in the Appendix.

## II.

## Grounds of Jurisdiction

The judgment of the Court of Appeals was entered March 12, 1980, and appears in the Appendix. Petitioner did not seek a rehearing in the Court of Appeals and, therefore, there is no order respecting a rehearing. There is no order granting an extension of time within which to petition for certiorari. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1) as incorporated by 28 U.S.C. §2350.

## III.

## Questions Presented for Review

1. Whether the Board acted arbitrarily or capriciously when without discussion it declared unlawful under §8(a)(1) of the Labor Management Relations Act, certain conduct of the Company which, in prior decisions involving other parties, the Board had found to be lawful.

2. Whether the Court of Appeals erred by granting enforcement of the Board's order.

## IV.

## Statutes Involved

Administrative Procedure Act §706(2)(A), (E), 5 U.S.C. §706(2)(A)

Scope of Review

Sec. 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . . .

Labor Management Relations Act (hereinafter "the Act") §7, 29 U.S.C §157.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to

form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and also shall have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in the labor organization as a condition of employment as authorized in section 8(a)(3).

Labor Management Relations Act §§8(a)(1), (5), 29 U.S.C. §§158(a)(1), (5).

Unfair Labor Practices

Sec. 8.

(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; and

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

V.

Statement of the Case

The Company never had been and is not now a member of the Bituminous Coal Operators Association (BCOA), but on July 6, 1977, it executed the National Bituminous Coal Agreement of 1974, effective December 6, 1974, to December 6, 1977 (the Agreement), which had been negotiated by the International Union, United Mine Workers of America (the International Union) and BCOA.

Thereafter, on July 28, 1977, the International Union, acting on behalf of District 28, United Mine Workers of America (District 28)[1/], gave notice to the Company of the Union's intention to

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[1/] Both collectively hereinafter referred to as "the Union".

terminate the Agreement. On September 26, 1977, the Company notified the Union that the Company also desired to terminate the Agreement as of its expiration date, and stated that it was ready to begin good faith negotiations.

Receiving no response to its letter, the Company sent the Union a second letter of December 1, 1977, in which the Company expressed its fear that a strike would begin on December 6 because of the failure of BCOA and the Union to reach agreement. This letter reiterated the fact that the Company was not a member of BCOA and, therefore, that it was not obligated to sign a contract negotiated for BCOA members. The letter re-emphasized the Company's willingness to negotiate with the Union. Further, this letter gave

notice to the Union of the Company's intention to provide its employees with a new life and health care insurance policy to replace those which would be lost at the commencement of a strike. In addition, the Company gave notice to the Union of its intent to negotiate a better pension plan for its employees.

Because the Agreement was to expire on December 6, 1977, the Company's President planned to have a dinner meeting with employees on December 1, 1977. At this meeting, the President discussed the fact that no agreement had been reached in negotiations taking place between the Union and BCOA. He also advised the employees that he had received no communication from any representative of the

Union in response to the Company's first letter. He restated the Company's willingness to meet with the Union to negotiate a new contract. With respect to a strike, he advised the employees that the Company intended to continue operating during the impending work stoppage.

To prevent the lapse of the insurance benefits provided employees by the Agreement, the Company had investigated certain insurance plans which could go into effect after the termination of the Agreement, thus providing continuity of benefits for employees working after December 6, 1977. This was communicated to the employees at the dinner meeting.

On December 5, 1977, the Company's President met with employees at the job

site. Because the Agreement was scheduled to expire on the next working day and the Union had indicated that it would strike if there were no agreement, the President asked the employees to indicate which of them would be working on the day the Agreement terminated. At the same time, an employee handed to the President a petition containing the names of 11 of the Company's 13 employees. The petition indicated that the named employees wanted to withdraw from the Union.[2/]

On December 6, 1977, the Union commenced its nationwide strike which ultimately was settled on March 27, 1978. Having received no response from the Union

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[2/] It was stipulated that the Company's President had no prior knowledge of the petition which was circulated by the employee before the dinner meeting on December 1, 1977.

regarding the hospitalization and pension plan referred to in the Company's second letter, and having received the petition. indicating that a majority of employees did not support the Union, the Company unilaterally instituted hospitalization and pension plans. At Christmas time, the Company gave a week's vacation to its employees.

In its decision, the Board concluded that the Company violated §8(a)(1) of the Act as a result of its conduct on December 1, 1977, and December 5, 1977. The Board found also that the Company violated §8(a)(5) of the Act as a result of its unilateral implementation of benefits on December 6, 1977, and at Christmas time later that month.

The Board ordered the Company to cease and desist from such conduct and from interferring with the rights of its employees guaranteed by §7 of the Act. The Board ordered the Company to bargain, upon request, with the Union and to post the notice appended to the Board's decision and order.

Thereafter, this case was heard by the Court of Appeals upon the Board's application for enforcement, filed pursuant to §10(e) of the Act, 29 U.S.C. §160(e).

In a per curiam opinion, the Court of Appeals recited the undisputed facts, at the conclusion of which it stated:

> Our review of the record as a whole discloses that there is substantial evidence to support the Board's findings that the Company engaged in the charged unfair labor practices.

> Accordingly, we grant enforcement of the Board's order.

In its judgment, entered on the same day as its opinion, the Court of Appeals stated:

> ON CONSIDERATION WHEREOF, It is ordered, adjudged, and decreed by the United States Court of Appeals for the Fourth Circuit, that the application for enforcement be, and it is hereby granted; and that the Respondent, Mountaineer Excavating Company, Inc., abide by and perform the directions of the Board in said order contained.

## VI.

## Argument

This case presents questions of great public importance in the administration and enforcement of the Act and to the viability of the Administrative Procedure Act. By enforcing the Board's order, the Court of Appeals has sanctioned arbitrary

and capricious conduct on the part of the Board, permitted the subversion of the administrative process, and destroyed the integrity of both the Act and the Administrative Procedure Act. The Court of Appeals has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

> 1. The Board acted arbitrarily or capriciously when without discussion it declared unlawful under §8(a)(1) of the Labor Management Relations Act, certain conduct of the Company which, in prior decisions involving other parties, the Board had found to be lawful.

The Administrative Procedure Act condemns agency action, findings, and conclusions found to be arbitrary or capricious. 5 U.S.C. §706(2)(A). An agency's action, finding, or conclusion can be arbitrary or

capricious on its face. Dunlop v. Bachowski, 421 U.S. 560, 575 (1975). A change in policy made with no explanation evidences arbitrary and capricious conduct. Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America, AFL-CIO v. NLRB, 603 F.2d 862, 882 (D.C. Cir. 1978).

It is difficult, if not impossible, for a court to review an agency determination or decision unless the agency has provided the court with a "statement of reasons supporting [its] determination". Dunlop v. Bachowski, 421 U.S. at 571. Failure to distinguish previous agency decisions also impedes the review process. NLRB v. Metropolitan Life Insurance Company, 380 U.S. 438, 442-443 (1965).

The failure of the Board to follow or distinguish its prior decisions not only frustrates the planning of effective labor-management relations, but gives the appearance of arbitrariness. Memorial Hospital of Rocksborough v. NLRB, 545 F.2d 351, 357 (3d Cir. 1976), quoting NLRB v. Metropolitan Life Insurance Company, 380 U.S. at 442. Failure to follow its prior determinations also could set in motion the element of estoppel. Local 777, etc. v. NLRB, 603 F.2d at 881-882.

The Company asserts that the Board acted arbitrarily or capriciously by deciding that the Company violated §8(a)(1) of the Act on December 1, 1977,

and on December 5, 1977.[3/] The Board determined that the Company offered its employees "substantial economic benefits" on both dates by discussing the nature of insurance coverage which would obtain after the strike ensued and by asking which employees would be working on the day of the strike. The Board's determination is directly contrary to its findings in other cases, briefed and argued before the Board, in which an employer engaged in substantially similar conduct. These cases are Marco Polo Resort Motel,

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[3/] These findings are crucial to the determination of whether the Company violated §8(a)(5) of the Act on December 6, 1977, by unilaterally implementing the insurance and pension plans, and at Christmas time that same month, by unilaterally granting a week's vacation. If there were no violations of §8(a)(1), then there was no conduct to vitiate the effect of the petition received by the Company on December 5, 1977, and the Company could rely thereon in refusing to bargain with the Union.

242 N.L.R.B. No. 186, 1979-1980 N.L.R.B. Dec. ¶15,994 (1979); Manitowoc Company, Inc., 186 N.L.R.B. No. 145, 1970 N.L.R.B. Dec. ¶22,518 (1970);[4/] Forster Manufacturing Company, Inc., 175 N.L.R.B. No. 29, 1969 N.L.R.B. Dec. ¶20,693 (1969); and Valley Feed and Supply Company, 135 N.L.R.B. No. 778, 1962 N.L.R.B. Dec. ¶10,897 (1962).

In its decision and order, the Board neglected to distinguish or explain these cases, although the Company could have been expected to rely upon them in planning its labor-management relations. The Board's failure evidences arbitrary or

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[4/] With respect to terms and conditions of employment discussed with employees before a strike began, the Board stated that "[s]ince the employer had stated that in the event of a strike it intended to continue operation, it was entitled to inform employees of the terms under which they would work."

capricious conduct and the Board's order should not have been enforced by the Court of Appeals, but should have been set aside under the provisions of §706(2)(A) of the Administrative Procedure Act.

2. The Court of Appeals erred by granting enforcement of the Board's order.

The 1947 Taft-Hartley Amendments to the Act indicated the intent of Congress to impose upon the courts the responsibility for assuring that the Board keep within reasonable grounds. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951). Universal Camera confirmed the standard set forth in §10(e) of the Act, which provides that findings of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive. This standard is the same as

that contained in §706(2)(E) of the Administrative Procedure Act. 340 U.S. at 487.

Courts reviewing agency findings and conclusions also are required to determine whether agency action is arbitrary or capricious, under the provisions of §706(2)(A) of the Administrative Procedure Act. An agency's failure to follow its prior decisions would warrant a reviewing court in setting aside the agency's determination. Local 777, etc. v. NLRB, 603 F.2d at 882; Memorial Hospital of Rocksborough v. NLRB, 545 F.2d at 357; Dunlop v. Bachowski, 421 U.S. at 574; NLRB v. Metropolitan Life Insurance Company, 380 U.S. at 442-444.

In its opinion, the Court of Appeals merely stated the undisputed facts and

recited the Universal Camera standard. In that case, Justice Frankfurter discussed the fact that it was criticism of a "contracted" reviewing power which engendered the Taft-Hartley Amendments. Just as the courts at that time may have been utilizing an incorrect standard for review of Board decisions, so now the courts may be attempting to discharge their responsibility by utilizing Universal Camera as the sole standard for review.

Although the Company briefed and argued before the Court of Appeals the impropriety of the Board's failure to distinguish or explain its prior decisions, the Company failed to obtain from the Court of Appeals any discussion or comment about the Board's conduct. To that extent, the Company asserts that the

Court of Appeals effectively ignored the mandate of §706(2)(A) of the Administrative Procedure Act and so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

## Conclusion

For the foregoing reasons, the Company prays that this Court grant a writ of certiorari.

MOUNTAINEER EXCAVATING COMPANY, INC.

By _____
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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAINEER EXCAVATING CO., INC.

and Case 5--CA--9104

UNITED MINE WORKERS OF AMERICA
(International Union), District 28

DECISION AND ORDER

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint and notice of hearing, dated March 2, 1978, against Mountaineer Excavating Co., Inc., hereinafter referred to as Respondent. The complaint alleges that Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and

complaint and notice of hearing were duly served on the parties. Respondent filed an answer to the complaint, denying commission of any unfair labor practices.

Thereafter, the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to itself for findings of fact, conclusions of law, and Order. The parties stipulated that they waived a hearing before, and the making of findings of fact and conclusions of law by, an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision, and that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the charges, complaint and notice of hearing, Respondent's answer to the complaint, and the stipulation of facts, including the

exhibits attached thereto, constitute the entire record in this case.

On September 27, 1978, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and Respondent filed briefs in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, including the exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following:

## Findings of Fact

### I. The Business of the Employer

The Employer, Mountaineer Excavating Co., Inc., is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Virginia, engaged in the surface mining of coal, having its principal office and place of business in Big Stone Gap, Virginia. During the past year, which period is representative of its annual operations generally, Respondent, in the normal course and conduct of its business, shipped in interstate commerce coal valued in excess of $50,000 directly to points located outside the State of Virginia. The parties have stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce

and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union, United Mine Workers of America (International Union), District 28, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Facts

Respondent commenced its coal mining operations in July 1977. On July 6, 1977, Respondent and the Union entered into a collective-bargaining agreement whereby Respondent recognized the Union as the representative of its employees and agreed to be bound by the terms of the National Bituminous Coal Agreement of 1974, effec-

tive December 6, 1974, to December 6, 1977. Respondent is not a member of the Bituminous Coal Operators Association (BCOA). On July 28, 1977, the International Union, acting on behalf of District 28, notified Respondent of the Union's intention to terminate the agreement and indicated it was prepared to meet and confer with Respondent for the purpose of negotiating a new agreement and to engage in good-faith collective bargaining. On September 26, 1977, Respondent wrote the International Union indicating that it also desired to terminate the contract and requested that a representative of District 28 contact it when it was ready to begin negotiations on a new agreement. There were no further communications between the parties until December 1, 1977.

On December 1, 1977, Tom Cooper, Respondent's president, wrote Ray Marshall, president of District 28, noting the earlier communications and commenting that Respondent had not heard from anyone in the Union regarding Respondent's request to begin bargaining. Cooper further noted that from the newspapers it appeared that there would be a strike after December 6 because of the failure of the Union and BCOA to reach an agreement covering the BCOA members, that Respondent was not a member of BCOA, that it was not obligated to sign any agreement entered into with BCOA, and that it was willing to negotiate with the Union for a new agreement between it and the Union. Cooper went on to state:

> If there is a strike called December 6th, we understand that the health care insurance benefits under the present contract

> will be cut off for our miners and their families due to lack of funds. If this happens, it is our intention to provide our men with a new life and health care insurance policy. We also want to negotiate a better pension plan for our men.
>
> We will be happy to answer any questions you may have about our proposed insurance and pension benefits we would like to give our men and their families. We will be happy to negotiate with you on these and other proposals at your earliest convenience.

During the evening of December 1, a previously scheduled dinner meeting of management and the employees was held. Most of the employees attended the meeting. During the course of the meeting, copies of Tom Cooper's speech were distributed to the employees and, following his speech, Phil Cooper, Respondent's business manager and secretary, presented the proposed health and pension plan referred to by Tom Cooper in

his speech. According to the printed version of the speech, Tom Cooper told the employees:

> And the worst part of it all, according to Arnold Miller and the UMW officials, it looks like your hospital card may not be any good after the strike begins. From what I can read and hear, the union is saying that your health and welfare fund is almost bankrupt and they may not pay any benefits at all during the strike. If the miners walk out December 6th, medical benefits will be cut off immediately.
>
> They say that pension payments could be cut from the first week in January.
>
> As you know, since the health and welfare and pension funds are financed and paid for by coal companies royality payments, if there is no coal being produced, there will be no royalties paid into the funds during the strike. A long strike will completely bankrupt every UMW health and welfare and pension fund for future benefits.
>
> For those miners who do not work during the strike, the $100 weekly sickness and accident benefit could be lost to them.

Under the law, the coal operators are not required to continue paying the insurance premiums for the $100 weekly sickness and accident benefit.

We intend to keep paying this premium for every man who continues to work for us during the strike.

What about your hospital and doctor bills for yourself and your family? What are you going to do about it? Unless you have enough money saved to pay these bills, they may not give you any services at the clinics except for cash.

We have though a lot about this serious problem for you and your family. We have contacted several insurance companies that provide good health care benefits for employees and their families.

We have come up with what we consider to be one of the best health care insurance programs. The beauty of this plan is that the hospital benefits are guaranteed to you and your family when you need them during the strike.

If your hospital and medical benefits are cut off next Wednesday, we intend to cover all of our men who continue working under this new hospital insurance plan for Mountaineer.

What will it cost you? Absolutely nothing.

On December 5, 1977, Tom Cooper met with the employees at the worksite and, since the contract was due to expire the next day and the UMW had called a strike for December 6, he asked the employees for a show of hands as to who would not work the next day. None of the employees raised their hands, and Cooper then told them their jobs would be available. During this same meeting, employee Baker handed Cooper a petition signed by 10 of the 13 employees, stating that they wished to withdraw from the UMW. The parties stipulated that Baker began circulating the petition prior to December 1, 1977, and that there was no evidence to show that Cooper knew of the petition prior to his receiving it.

On December 6, 1977, the UMW commenced its nationwide strike against the BCOA, which was ultimately settled on March 27, 1978, when the UMW ratified the new contract. On December 6, Respondent put into effect its new hospitalization and pension plans. Approximately 2 weeks later, Cooper, without any consultation with the UMW, granted employees a week's vacation during the Christmas period.

On January 3, 1978, District 28 filed a charge alleging that since on or about December 6, 1977, Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a) (1) of the Act. On January 31, 1978, Marshall, president of District 28, wrote Respondent referring to Respondent's letter of December 1, 1977, and to the unfair labor practice charge filed herein,

stating that the UMW is, and has been, ready and willing to engage in good-faith negotiations with Respondent, and offered to begin negotiations with Respondent. There were no further communications between Respondent and representatives of the UMW and, on March 2, 1978, the instant complaint was issued by the Regional Director for Region 5.

B. Contentions of the Parties

The General Counsel contends that Respondent unilaterally offered its employees substantial benefits without notice to or bargaining with the Union; that Respondent raised no evidence of a good-faith doubt of the Union's majority status as of December 1, 1977; that the Union's contract was still in effect as of that date; that Cooper's December 1 speech was directed toward discouraging its

employees from participating in the impending strike; that it was an attempt by Respondent to undercut the Union's majority status by offering a company health and pension plan at a time when the employees were facing a possible loss of such coverage because of the impending strike; that the offer of such benefits, coupled with Cooper's interrogation of the employees on December 5 with regard to their intentions about the impending strike, was an attempt to bargain individually with the employees; that such conduct interfered with the employees' Section 7 rights; and that by such conduct Respondent violated Section 8(a) (1) and (5) of the Act.

Respondent contends that its December 1 meeting with the employees, where it discussed the potential failure of the

Union's health and welfare plans, violated neither Section 8(a) (1) nor 8(a) (5) of the Act, that it timely notified the Union what course it would take in the event the Union's plans failed because of a strike; that it was incumbent upon the Union to thereafter indicate in some manner that it disapproved thereof and desired to negotiate or bargain with respect thereto; that the Union failed to request bargaining subsequent to either of the Respondent's letters to the Union; that, by failing to request bargaining on the substitute plans, the Union waived its right to protest the institution of the plans; and that the facts of this case closely parallel those present in AAA Motor Lines, Inc.,[1/] where the Board found

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[1/] 215 NLRB 793 (1974).

that the employer did not violate the Act when it instituted various employee benefit plans in substitution for the benefit plans that terminated with the expiration of the collective-bargaining agreement.

C. The Merits

The General Counsel argues that Respondent unilaterally approached its employees and offered them substantial benefits without notice to or bargaining with the Union at a time when the Union was the bargaining representative of the employees and the Union's collective-bargaining agreement with the Respondent was still in effect; that such conduct was nothing more than an attempt to bargain individually with the employees in order

to discourage the employees from participating in the impending strike and to cause the Union to lose its majority status. Based on the particular facts of this case, we agree that Respondent's conduct violated both Section 8(a) (1) and (5) of the Act.

Under Section 8(d) of the Act, collective bargaining imposes on the parties the mutual obligation to "meet at reasonable times" and confer with regard to entering into a new collective-bargaining agreement. Where, as here, both parties desired to terminate the existing agreement upon its expiration, it was incumbent on both to take steps to meet at reasonable times and confer on proposed changes. Notwithstanding these mutual obligations, neither party, after the ini-

tial exchange of letters, took any steps to put the bargaining process into motion. The UMW concentrated its entire efforts on the national negotiations going on with the BCOA,[2/] while Respondent did absolutely nothing until its letter of December 1. From these brief facts, it is clear that both parties failed to meet their obligations under Section 8(d), but the failure of one of the parties to meet its obligations does not, in and of itself, excuse the other party from complying with its statutory obligations.

In AAA Motor Lines, Inc., supra, we recognized an employer's right to take

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[2/] We find no merit in Respondent's contention that the Union's bargaining tactic of securing a National Agreement (with the BCOA) first constituted a waiver of its bargaining rights on behalf of Respondent's employees.

action to avoid the loss of certain employee benefits as a result of the expiration of the collective-bargaining agreement. The facts in that case, however, amply demonstrate that the employer, in the face of the union's avoidance and evasion, made diligent and earnest efforts over a period of approximately 2-1/2 months to bargain with the union with regard to the various contract proposals it had earlier submitted to the union. The record there also showed that the employer did not discuss its proposals with the employees until long after they had been submitted to the union, and, then, instituted only those programs which (1) had been submitted to the union and (2) were or would normally have been of immediate concern to the employees.

In the instant case, the stipulation and exhibits clearly establish that Respondent intended to bypass the Union. On November 1, 1977, Respondent executed a money purchase pension plan and trust agreement with the First National Bank, but did not, at any time prior to December 6, 1977, notify the Union of the execution of this plan or submit the same to the Union for its consideration.[3/]

If Respondent had been desirous of (1) entering into negotiations with the UMW, it needed only to direct timely com munications to the Union specifically

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[3/] The stipulation and exhibits do not indicate when Respondent finalized the agreements for the hospitalization insurance and the sickness and accident insurance, but, since these programs were discussed in detail at the December 1 meeting, we assume that Respondent had also finalized these programs prior to December 1.

requesting negotiating sessions or (2) making particular proposals to the Union, its obligation was to submit these proposals timely to the Union. It did neither. Rather, Respondent played a "waiting game" until the bargaining at the national level reached a crisis stage, and them sent the December 1 letter to the Union requesting negotiations and, on that very same evening, met with the employees, predicted dire economic circumstances, and offered them substantial economic benefits designed to induce them to abandon their Union and bargain directly with Respondent. Respondent obviously timed that December 1 letter so as to preclude any possibility of the Union consulting with the employees, or any real or meaningful consideration by the Union of Respondent's stated intent to institute

certain benefits as of December 6. In addition, notwithstanding the fact that Respondent contracted for the pension plan a month earlier, it concealed this fact by stating in the letter that it wanted "to negotiate a better pension plan for our men." On December 5, Respondent again unilaterally offered its employees substantial economic benefits when it inquired of the employees as to whether any of them were going to strike the next day and advised them, without disavowing its intentions as expressed at the December 1 meeting of putting into effect different terms and conditions of employment, that their jobs would be available. Having precluded any meaningful response by the Union by virtue of the timing of its actions, Respondent then took the final step on December 6 by uni-

laterally putting into effect both the hospitalization plan and the pension plan.

These facts abundantly demonstrate that Respondent's contention that it fulfilled its bargaining obligations under Section 8(d) of the Act, and that the burden shifted to the Union to take action, is clearly without merit. The facts amply demonstrate that Respondent's conduct was timed and designed to deal directly with the employees and to avoid bargaining with the Union. It is equally clear that Respondent's reliance on our decision in AAA Motor Lines, Inc., supra, is misplaced. There, the employer made timely, diligent, and earnest efforts to negotiate with the union, and implemented only those programs which had both been

submitted to the union and encompassed areas of immediate concern to its employees. The employer specifically refrained from instituting its proposed pension plan, leaving it for future negotiations with the union. Respondent offers no explanation as to why it was necessary to implement immediately a substitute pension plan for employees, all of whom had been in Respondent's employ for less than 6 months as of December 6, 1977. Finally, in AAA Motor Lines the employer's attempt to negotiate with the union prior to submitting its proposals to the employees negated any claim that it was attempting to bypass the union and bargain directly with its employees in an attempt to induce them to abandon their union.

## D. Conclusions

We conclude that, by unilaterally offering its employees on December 1 and 5, 1977, substantial economic benefits designed to induce them to abandon their Union and bargain directly with Respondent, Respondent interfered with its employees' Section 7 rights in violation of Section 8(a)(1) of the Act. We further conclude that, by unilaterally implementing these programs on December 6, and by unilaterally changing the employees' vacation schedule in December 1977, in both instances without having first timely notified the Union of its proposed actions and offering to bargain with the Union with regard to these matters, Respondent failed to bargain in good faith in viola-

tion of Section 8(a)(5) of the Act.[4/]

## IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth above, occurring in connection with the operations of the Employer, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, we make the following:

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[4/] In view of our finding herein that Respondent violated Sec. 8(a)(1) of the Act by its conduct on December 1 and 5, 1977, we find and conclude that the employees' petition of December 5, 1977, indicating that they no longer wished to be represented by the UMWA, to be without any force or effect.

## Conclusions of Law

1. Mountaineer Excavating Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America (International Union) District 28, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. All of Respondent's employees employed in a unit as described in the collective-bargaining agreement between the parties known as the National Bituminous Coal Agreement of 1974, effective December 6, 1974, to December 6, 1977, constitute a unit appropriate for

collective bargaining pursuant to Section 9(b) of the Act.

4. By unilaterally offering its employees on December 1 and 5, 1977, substantial economic benefits designed to induce them to abandon their Union and bargain directly with Respondent, Respondent interfered with its employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

5. By unilaterally implementing various economic benefits on December 6, 1977, without having first timely notified the employees' collective-bargaining representative of its intent to put those benefits into effect and offering to bargain with the said representative with regard to said benefits, Respondent failed

to bargain in good faith in violation of Section 8(a)(5) of the Act.

6. By unilaterally changing the employees' vacation schedule by granting a 1-week vacation in December 1977, without having first timely notified the employees' collective-bargaining representative of its intent to change the vacation schedule and offering to bargain with the said representative with regard to this change, Respondent failed to bargain in good faith in violation of Section 8(a)(5) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

Having found that Respondent engaged in, and is engaging in, certain unfair labor practices, we shall order that it cease and desist therefrom[5/] and take certain affirmative action designed to effectuate the policies of the Act.

## ORDER

The Respondent, Mountaineer Excavating Co., Inc., Big Stone Gap, Virginia, its officers, agents, successors, and assigns, shall:

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[5/] Nothing contained in our Order herein shall be construed as authorizing or requiring Respondent to withdraw or eliminate any benefits or other changes in the terms and conditions of employment presently enjoyed by Respondent's employees.

1. Cease and desist from:

(a) Unilaterally offering its employees substantial economic benefits designed to induce them to abandon their collective-bargaining representative and bargain directly with Respondent.

(b) Refusing to bargain collectively concerning rates of pay, wages, and other terms and conditions of employment with United Mine Workers of America (International Union), District 28, as the exclusive representative of its employees in the appropriate unit which is described in the collective-bargaining agreement between the parties known as the National Bituminous Coal Agreement of 1974, effective December 6, 1974, to December 6, 1977.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-referred-to appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Post at its Big Stone Gap, Virginia, facility copies of the attached

notice marked "Appendix."[6/] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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6/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. March 23, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT unilaterally offer our employees substantial economic benefits designed to induce them to abandon their collective-bargaining representative and bargain directly with us.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Mine Workers of America (International Union), District 28, as the exclusive representative of the employees in the appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit which is described in the collective-bargaining agreement between the parties known as the National Bituminous Coal Agreement of 1974, effective December 6, 1974, to December 6, 1977, with respect to rates of pay, wages, hours, and other terms and conditions of

employment, and, if an understanding is reached, embody such understanding in a signed agreement.

MOUNTAINEER EXCAVATING CO., INC.
(Employer)

Dated _____ by _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 West Lombard Street, Ninth Floor, Baltimore, Maryland 21201, Telphone 301--962--2772.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1300

National Labor Relations Board,

Petitioner

v.

Mountaineer Excavating Co., Inc.,

Respondent

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On Application for Enforcement of an Order of the National Labor Relations Board

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Argued: February 8, 1980
Decided: March 12, 1980

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Before RUSSELL and SPROUSE, Circuit Judges, and THOMSEN*, District Judge.

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*Honorable Roszel C. Thomsen, Senior United States District Judge for the District of Maryland, sitting by designation.

Paul J. Spielberg, Deputy Assistant General Counsel, NLRB (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Barbara G. Gehring, NLRB on brief) for Petitioner; Mark M. Lawson (White, Elliott & Bundy on brief) for Respondent.

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PER CURIAM:

Mountaineer Excavating Company, Inc. (the "company") was found by the National Labor Relations Board (the "Board") to have violated §§8(a)(1) and 8(a)(5) of the National Labor Relations Act. 29 U.S.C. §§158(a)(1) and 158(a)(5). The Board's other (241 NLRB No. 80) required the company to cease and desist from making unilateral offers of substantial economic benefit to its employees designed to induce them to abandon their collective bargaining representative and bargain directly with the company, and from

refusing to collectively bargain with the United Mine Workers of America, District 28 (the "union") as the exclusive representative of the company's employees. The Board also ordered the company to collectively bargain with the union upon request. The Board seeks enforcement of this order.

Mountaineer Excavating Company, Inc., is a corporation engaged in the surface mining of coal at Big Stone Gap, Virginia, since July, 1977. At the commencement of these operations, the company and the union entered into a collective-bargaining agreement, consenting to be bound by the National Coal Agreement of 1974 between the International Union, United Mine Workers of America and the Bituminous Coal Operators Association ("BCOA"), even though the company was not a member of the

BCOA. The effective dates of the National Coal Agreement were December 6, 1974 to December 6, 1977.

On July 28, 1977, the International Union, acting on behalf of District 28, notified the company that the union intended to terminate the existing agreement as of December 6, 1977 and was prepared to negotiate a new arrangement. The company responded with a similar letter on September 26, 1977.

There was no further contact between the company and the union until December 1, 1977. The company, at that time, sent a second letter, stating that it was willing to negotiate a new agreement. It indicated that since union health insurance benefits would be lost during the strike due to a lack of funds, the company intended to provide its own life

and health insurance policy to its employees, and hoped to negotiate a pension plan for them.

On the same evening which the company mailed this second letter, the company gave a dinner for all its employees. The president, Tom Cooper, informed the employees at dinner that the company intended to continue operating its Big Stone Gap works during the impending strike. He stated that since the "trust" fund was almost bankrupt, the union medical and pension benefits would be cut off during the strike. President Cooper offered to provide at no extra cost a health insurance program for those that continued to work. The Company's business manager then explained the pension plan. The company, unknown to the union, had previously executed the pension plan on November 1, 1977.

On December 5, 1977, President Cooper met with the employees of the company at the worksite and asked for a show of hands of those who would not be working the next day, the day that the national strike was scheduled to begin. None of the employees raised their hands.

The next day, December 6, the union commenced its nationwide strike and the company put into effect its own hospitalization and pension plans. Approximately two weeks later, the company gave its employees a week's vacation without notifying the union. Shortly thereafter, the union filed a charge with the Board, claiming that the company had engaged in unfair labor practices in violation of the National Labor Relations Act (the "Act").

On March 23, 1979, the Board found that the company was in violation of

Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), by offering its employees substantial economic benefits on December 1 and December 5, 1977 to induce those employees to abandon the union and bargain directly with the company. The Board also found that the company had violated Section 8(a)(5) of the Act, 29 U.S.C. §158(a)(5), by unilaterally changing its employee's health and pension benefits, and vacation schedule without notifying or bargaining with the designated collective-bargaining representative.

Our review of the record as a whole discloses that there is substantial evidence to support the Board's findings that the company engaged in the charged unfair labor practices.

Accordingly, we grant enforcement of the Board's order.

ENFORCEMENT GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1300

National Labor Relations Board,

Petitioner

v.

Mountaineer Excavating Co., Inc.,

Respondent

On Application for Enforcement
of an Order of the National
Labor Relations Board

THIS CAUSE, came on to be heard upon the application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, on March 23, 1979, in proceedings before the said Board known upon its records as Case No. 5-CA-9104; upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the application for enforcement be, and it is hereby granted; and that the Respondent, Mountaineer Excavating Company, Inc., abide by and

perform the directions of the Board in said order contained.

/s/ William K. Slate, II
Clerk

COSTS FOR THE RESPONDENT

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| Costs of printing petitioners' brief | $ 84.00 |
| Costs of printing petitioners' appendix | 70.20 |
| Total Costs | $154.20 |